In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-347

PHILLIPS PETROLEUM COMPANY, a Corporation,
Petitioner,

vs.

TEXACO INC., a Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

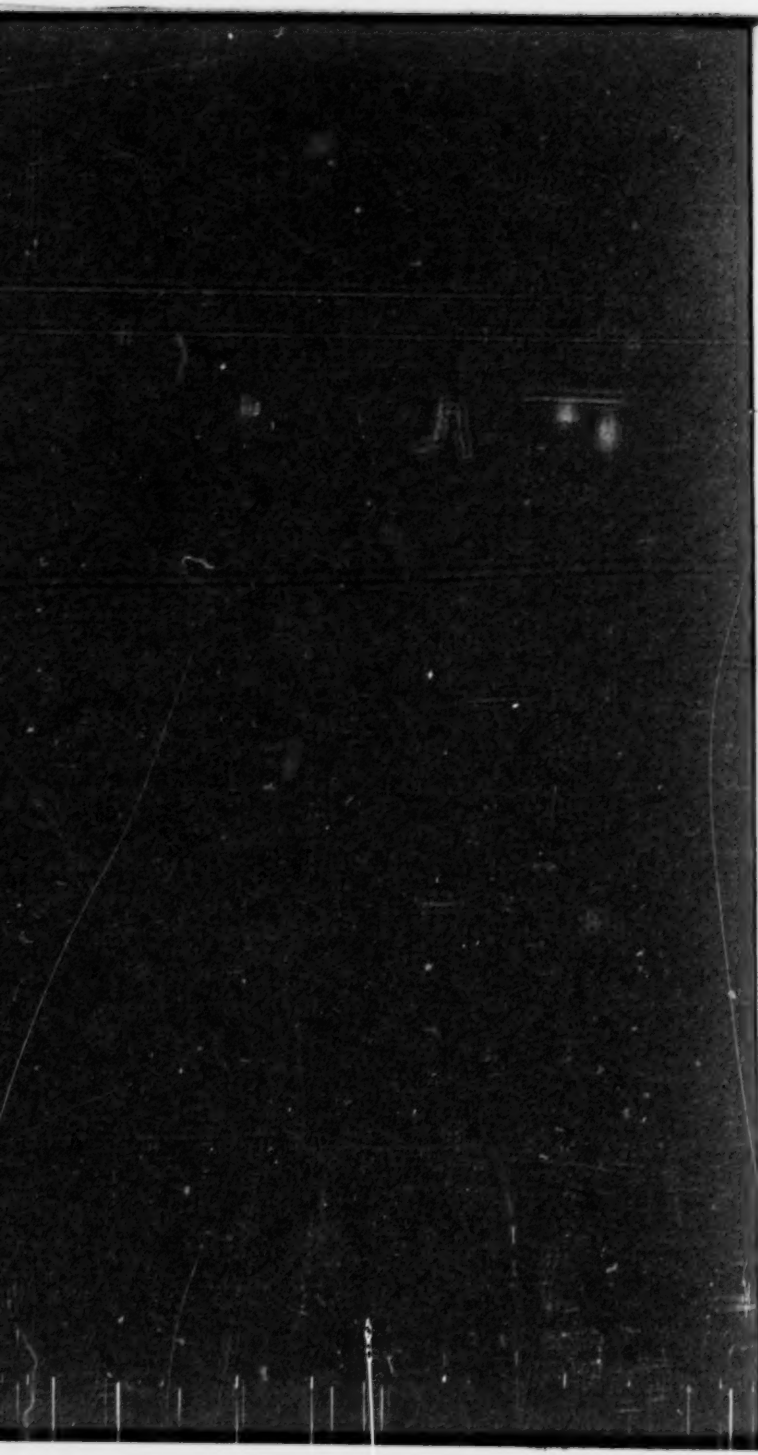
BRIEF AMICUS CURIAE ON BEHALF OF NORTHERN NATURAL GAS COMPANY, NORTHERN HELEX COMPANY, CITIES SERVICE GAS COMPANY, CITIES SERVICE CRYOGENICS, INC. AND CITIES SERVICE HELEX, INC.

F. VINSON ROACH
DANIEL J. O'BRIEN
PATRICK J. McCARTHY
2223 Dodge Street
Omaha, Nebraska 68102
Counsel For:
Northern Natural Gas Company, Northern Helex Company

GRAYDON D. LUTHEY
WILLIAM J. SEARS
First National Building
Oklahoma City, Oklahoma 73125
Counsel For:
Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.

*MARK H. ADAMS
MARK H. ADAMS II
WILLIAM S. RICHARDSON
P.O. Box 1034
Wichita, Kansas 67201
Counsel For:
Northern Natural Gas Company, Northern Helex Company, Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.

*Counsel upon whom service is to be made.



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BRIEF AMICUS CURIAE ON BEHALF OF NORTHERN NATURAL GAS COMPANY, NORTHERN HELEX COMPANY, CITIES SERVICE GAS COMPANY, CITIES SERVICE CRYOGENICS, INC. AND CITIES SERVICE HELEX, INC.

QUESTION PRESENTED

Whether Section 11 of the Helium Act Amendments of 1960 (Public Law 86-777, 74 Stat. 918, 50 U.S.C. §167 et seq.) creates a federal cause of action for recovery of the reasonable value of the helium constituent of natural gas sold and delivered by respondent, Texaco, Inc., to petitioner, Phillips Petroleum Company?

INTEREST OF AMICUS CURIAE

Northern Natural Gas Company and Cities Service Gas Company are natural gas pipeline companies engaged, inter alia, in the purchasing, gathering, transmission and sale of natural gas in interstate commerce for resale. Their affiliates, Northern Helex Companies, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc., are engaged in the extraction of helium from helium-bearing natural gas which is sold to the United States under contracts authorized by the Helium Act Amendments of 1960.

The Northern and Cities Companies were not parties to the instant action but are parties to the Consolidated Helium Cases (*Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704), which the Court of Appeals for the Tenth Circuit relied upon and which the Court of Appeals has further construed in the instant case.

In *Northern Natural Gas Company* v. *Grounds*, the Court of Appeals held that the exemption of Section 11 of the Helium Act Amendments, applied to independent producer sales of helium-bearing natural gas and that regulations under the Natural Gas Act had nullified the contracts between the independent producers and their pipeline purchasers. Holding that the two statutes created a regulatory "void", the Court of Appeals ordered the helium extraction companies to account to the independent producers for the reasonable value of the helium constituent of the helium-bearing natural gas which the helium companies extracted and sold to the United States. Those complex proceedings, involving some 30,000 royalty owners, 500 independent producers, 8 helium companies, and the United States are pending in the United States District Court for the District of Kansas (Case No. KC-1980 et al.).

In the wake of the decision in *Northern Natural Gas* v. *Grounds,* numerous additional actions (some of which are class actions of a massive scale) were instituted in the federal and state courts of Kansas, Oklahoma, and Texas. The present proceeding is one such case. In this case, the Court of Appeals for the Tenth Circuit construed its prior opinion in *Northern Natural Gas* v. *Grounds* to hold: (1) "private contract law and the principles applicable thereto are not controlling." (2) "We thought that we made plain [In *Northern* v. *Grounds*], that we did not allow recovery on the application of any principles of equity. . ." (3) "The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. [e.g. Section 11 of the Helium Act Amendments] Plaintiff asserts rights under those statutes and is entitled to sue in federal court."

A determination by this Court of the basic jurisdictional issue, or correction of the contorted rationale by which the Court of Appeals reached its ultimate decision, will expedite not only the disposition of the instant case, but advance the ultimate termination of the great volume of helium litigation which has so long plagued the courts and the parties (including the Northern and Cities Companies).

ARGUMENT

The petition for writ of certiorari in this case should be granted.

First. A determination by this Court of the basic jurisdictional issue, or of any of the controlling questions

of law inherent in such determination, will expedite the disposition of the instant case, and advance the ultimate termination of the great mass of helium litigation engendered by the Court of Appeals' decisions in *Northern Natural Gas Company* v. *Grounds,* and in the instant case. e.g.: *Clarence Gigot, et al.* v. *Cities Service Oil Co., et al.,* No. W-4611; *Wiley R. Gore, et al.* v. *Amerada Hess Corp.,* No. W-4612; *Oliver Brown, et al.* v. *Mobil Oil Corporation, et al.,* No. W-4613, in the United States District Court for the District of Kansas; *Ashland Oil, Inc.* v. *Phillips Petroleum Company and the United States of America,* No. ....., in the United States Court of Appeals for the Tenth Circuit (No. 67-C-238 in the United States District Court for the Northern District of Oklahoma); *Cities Service Oil Company* v. *Phillips Petroleum Company,* No. 73-C-230, in the United States District Court for the Northern District of Oklahoma; *Amoco Production Company* v. *Phillips Petroleum Company,* No. 44,864, in the 108th Judicial District Court, Potter County, Texas.

Second. The opinion by the Court of Appeals in the instant case has parlayed the exemption provision of Section 11 of the Helium Act Amendments into an affirmative grant of federal jurisdiction over contract actions, neither apparent from the language of the Act nor deducible from the intent of Congress. This vast expansion of the federal question jurisdiction of the District Courts is contrary to the settled precedents of this Court (e.g. *Snyder* v. *Harris,* 394 U.S. 332 and the cases cited by petitioner in its Petition for Writ of Certiorari) and substantially increases the rising case load in the federal courts beyond the precise limits provided by statute.

Third. The opinion by the Court of Appeals is contrary to the settled proposition that the Natural Gas Act

did not, ipso facto, abrogate the provisions of private contracts.

United Gas Pipe Line Co. v. *Mobile Gas Corp.*, 350 U.S. 332, 338-340, 343-345 and 347.

Federal Power Com. v. *Sierra P.P. Co.*, 350 U.S. 348, 352-353, 354-355.

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Michigan Consol. Gas Co. v. *Panhandle Eastern P.L. Co.*, 226 F.2d 60 (Sixth Circuit).

Episcopal Theological Sem. v. *Federal Power Com'n.*, 269 F.2d 228, 234 (D.C. Circuit).

Fourth. The opinion by the Court of Appeals renders Section 11 of the Helium Act Amendments, as construed and sought to be applied, of doubtful constitutional validity under the Due Process and Just Compensation Clauses

of the Fifth Amendment to the Constitution of the United States.

Before passage of the Helium Act Amendments of 1960 the petitioner here involved had a contract right to purchase natural gas, including the helium constituent, on a volumetric basis and at the price agreed upon in such contracts. After passage of the Helium Act Amendments of 1960, the Court of Appeals holds, the Helium Act Amendments of 1960 and the Natural Gas Act vitiate the prices agreed upon by the parties in their contracts.

The vice in such reasoning is that the due process clause of the Fifth Amendment in the field of federal activity demands that a public law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. See *Nebbia* v. *New York*, 291 U.S. 502, 525; *United States* v. *Carolene Products Co.*, 304 U.S. 144; *Atlanta Motel* v. *United States*, 379 U.S. 241. No such relationship between appropriation of petitioner's contract rights and the public objectives of the Natural Gas Act or the Helium Act Amendments has been established. Moreover, as a matter of elementary justice, ". . . taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process." *Missouri Pacific R. Co.* v. *Nebraska, ex rel. Board of Transportation*, 164 U.S. 403, 417 (also see: *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Louisville First Stock Land Bank* v. *Radford*, 295 U.S. 555; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, and cases cited).

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

F. VINSON ROACH
DANIEL J. O'BRIEN
PATRICK J. McCARTHY
2223 Dodge Street
Omaha, Nebraska 68102
Counsel For:
Northern Natural Gas Company, Northern Helex Company

GRAYDON D. LUTHEY
WILLIAM J. SEARS
First National Building
Oklahoma City, Oklahoma 73125
Counsel For:
Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.

MARK H. ADAMS
MARK H. ADAMS II
WILLIAM S. RICHARDSON
P.O. Box 1034
Wichita, Kansas 67201
Counsel For:
Northern Natural Gas Company, Northern Helex Company, Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 1973, three copies of the foregoing "Motion for Leave to File Brief Amicus Curiae Out of Time on Behalf of Northern Natural Gas Company, Northern Helex Company, Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.—together with Brief Amicus Curiae" were mailed, with air mail postage prepaid, to each of the following:

Counsel of Record for Petitioner, Phillips Petroleum Company:

Richard B. McDermott
1300 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Lloyd G. Minter
Kenneth Heady
Don L. Jemison
Phillips Petroleum Company
Bartlesville, Oklahoma 74004

Counsel of Record for Respondent, Texaco, Inc.:

Elmer W. Adams
Phillip R. Wimbish
P.O. Box 2420
Tulsa, Oklahoma 74102

Solicitor General of the United States:

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

.....

WILLIAM S. RICHARDSON
P.O. Box 1034
Wichita, Kansas 67201
One of Counsel for Applicants, Northern Natural Gas Company, Northern Helex Company, Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.